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SUSAN LAPSLEY
Director



Date: June 11, 2008

To: Leonard Lang

From: Chapter Two Compliance Unit

Subject: **2008 OAL DETERMINATION NO. 10(S)**
(CTU 2008-0421-06)
(Summary Disposition issued pursuant to Gov. Code, sec.
11340.5; Cal. Code Regs., tit. 1, sec. 270(f))

Petition challenging the imposition of a no-baling condition on a
recycler's certificate by the Department of Conservation, Division
of Recycling

On April 21, 2008, you submitted a petition to the Office of Administrative Law (OAL) asking for a determination as to whether the imposition on the recycler's certificate of a no-baling condition by the Department of Conservation, Division of Recycling (Department), is an underground regulation.

In issuing a determination, OAL renders an opinion only as to whether a challenged rule is a "regulation" as defined in Government Code section 11342.600, which should have been, but was not adopted pursuant to the Administrative Procedure Act (APA).¹ Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

On January 9, 2008, the Department sent Mr. Joshua Laureano a letter in which the Department required that "All shipments of beverage container material for CRV reimbursement may not be delivered in any baled condition." You allege in your petition that the imposition of this condition is an underground regulation.

In *Tidewater Marine Western, Inc. v. Victoria Bradshaw* (1996) 14 Cal.4th 557, 571, the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov.

¹ Such a rule is called an "underground regulation" as defined in California Code of Regulations, title 1, section 250, subsection (a):

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

Code, §11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, § 11342, subd. (g)).

The first element of a regulation is whether the rule applies generally. Public Resources Code section 14591.2(c)(3) provides:

(c) The department may take disciplinary action pursuant to this section, by taking any one of, or any combination of, the following:

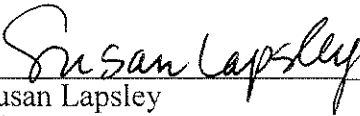
....

(3) Imposition on the certificate or registration of any condition that the department determines would further the goals of this division.

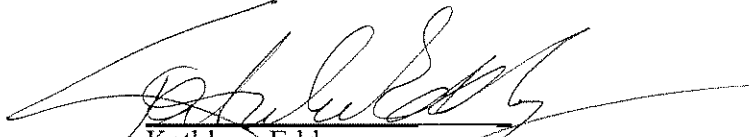
In the case involving Mr. Laureano, the letter from the Department indicates that Department staff found rejected containers in a load of baled PET #1 plastic delivered by LAUR Metals. As a result, the Department imposed a no-baling condition on LAUR Metals pursuant to Public Resources Code section 14591.2. Based on the facts before us, the Department's disciplinary action against Mr. Laureano does not constitute a rule of general application but, rather, appears to be the exercise of disciplinary authority on a case by case basis. Because no rule of general application has been established, we find that no underground regulation exists.²

The issuance of this summary disposition letter does not restrict your right to adjudicate the alleged violation of section 11340.5 of the Government Code.

Date: June 11, 2008



Susan Lapsley
Director



Kathleen Eddy
Senior Staff Counsel

²The demonstration that the challenged rule is not an underground regulation is the proper subject of a summary disposition letter. California Code of Regulations, Title 1, section 270, subdivision (f) provides:

(f)(1) If facts presented in the petition or obtained by OAL during its review ... demonstrate to OAL that the rule challenged by the petition is not an underground regulation, OAL may issue a summary disposition letter stating that conclusion.

....